IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.464 OF 1994

The State of Maharashtra Appellant

Vs.

Ankush Bhikaji Keluskar
resding at and post
Tarkarli, Taluka Malwan,
District Sindhudurg. Respondent
(Org. Accused)

Smt. V.R. Bhosale, APP for Appellant.
None for the respondent-accused.

CORAM : S.S. PARKAR & S.R. SATHE, JJ.

Date : November 02, 2004.

ORAL JUDGMENT (PER S.S. PARKAR,J.):

1. This is an appeal filed by the State challenging the Judgment and Order dated 29/4/1992 delivered by the Additional Sessions Judge, Sawantwadi, Sindhudurg acquitting the respondent-accused of the offence under Section 376 read with Section 511 of IPC in Sessions Case No.34 of 1991.

2. Briefly narrated the prosecution case is as under:-

. Prosecutrix, a minor girl of 9 years by name Kamini Khavanekar PW 6, was selling fruits in the

afternoon of 10/2/1991 along with her younger sister Pushpalata in her village Tarkarli in Taluka Malwan, District Sindhudurg. At that time she was induced and taken by the respondent-accused to nearby lonely place called Awara on the pretext of giving her more fruits. When the girl was reluctant to go along with him on the ground that her mother would not permit her, the respondent-accused told her that he was her maternal uncle and, therefore, her mother would not object to it. The respondent-accused then attempted to rape her. She then came to the house of their neighbour PW 7 Janavi Joshi where her mother was viewing T.V. She was in frightened condition and would not utter a word and asked for water. She was then taken to her house by her mother and after some time she told her mother that one person had taken her away on the pretext of giving her more fruits to the place called Awara. After the return of Kamini's father home from work in the evening, complainant Gautami Khavanekar, the mother of Kamini told him about the incident. They went out in search of the person but since it was dark they could not find anybody and, therefore, they returned home. Next day morning Kamini along with her parents went out in search of the person who had on earlier day attempted to rape her. They noticed respondent-accused who fled from that place after

seeing these persons. Kamini identified and pointed out the accused as the person who had attempted to rape her earlier day. The parents of the Kamini went to the police station where FIR Exh.15 was lodged and the crime was registered for offence under Section 376 read with Section 511 of IPC. Accused was arrested on the following day i.e. 12/2/1991. Spot panchanama was drawn in the presence of panchas. Place of offence i.e. Awara was pointed out by Kamini herself. Statements of the witnesses were recorded. Kamini as well as the accused were sent for medical examination. The clothes of accused as well as Kamini, which were worn by them at the time of incident, were seized under panchanama and were sent to C.A. for examination. After completion of the investigation, charge-sheet came to be filed and the case was committed to the Sessions Court.

3. Before the Sessions Court charge was framed against the respondent-accused for offence under Section 376 read with Section 511 of IPC, to which the accused pleaded not guilty. On behalf of the prosecution 11 witnesses were examined. They consisted of complainant Gautami Khavanekar PW 1 who is the mother of Kamini. Kamini herself was examined as PW 6. PW 7 is Javanvi Joshi in whose house

complainant was viewing T.V. at the relevant time when Kamini went there in frightened condition. PW 8 is Madhuri Khavanekar, the paternal aunt of Kamini. Father of Kamini, Gurunath Khavanekar is examined as PW 9. PW 5 is Dr. Achyut Somwanshi who had examined both the accused as well as prosecutrix Kamini. PW 10 is PSI Jagannath Khairnar, who investigated the offence. The panch witnesses PWs 2 and 3 who had acted as panch to the spot panchanama had turned hostile. PW 4 is police constable who had taken the clothes of the accused and the girl to the office of C.A. and lastly PW 11 is police head constable Madhukar Pawar who had recorded the complaint and registered the crime. The defence of the accused was of total denial.

4. After considering the entire evidence on record, the trial court acquitted the respondent-accused, inter alia, on the ground that the identity of the accused was not properly etablished and T.I. parade was not held and there were no signs of any attempt having made by the accused as per the medical evidence. The said order of acquittal is impugned in this appeal filed by the State.

5. Smt. Bhosale, APP, appearing for the State

has taken us through the entire evidence on record and contended that the medical examination of Kamini shows that there was attempt made to rape her and though she did not know the name of the accused, she had identified him in the presence of her parents on the basis of which the complaint was lodged with the police against the accused.

6. No doubt the prosecutrix, who was hardly 9 years old and was studying in 4th standard at the relevant time, has deposed in her evidence that when she was along with her younger sister Pushpalata selling fruits on the road at about 1.30 p.m., accused came from the Port side and induced her to go with him for getting more fruits. She was taken by him to the place called ‘Awara’ where there were bushes of ‘Lengadi’. She was made to lie on the floor and then he lifted her frock and lowered her underwear upto her knees. Then he removed his own clothes and rubbed his private organ on her private part. She shouted that time and, therefore, accused ran away towards seashore. She then went to the house of Joshi where her mother was watching T.V. Her evidence is supported by her mother Gautami PW 1 who has lodged complaint and her paternal aunt Madhuri in whose presence Kamini had told them about the misdeed of

respondent-accused. Janavi Joshi in whose house the T.V. was being watched by the complainant and others when Kamini went there in frightened condition has not supported the prosecution case fully. But she has stated that at the relevant time Kamini had gone to her house in frightened condition and asked for water.

7. As per the evidence of PW 5 Dr. Somwanshi, he had examined Kamini on 11/2/1991 and found the following injuries on her person:-

1. Abrasion on right thigh on medical aspect 3 and half inches above the knee joint.

2. 1/2" in length, 1/2 cm. in breadth.

3. Pelvis examination; Tenderness on both libia oedratious and congested.

4. Mucous membrance on medical aspect of libia is congested.

5. Hymen intact. No bleeding.

. According to him age of injuries were in between 24 to 36 hours. He had done swab examination from vagina of Kamini but no sperms were found. According to his opinion rape was not successful but there was an attempt to commit rape. He was the Medical Officer of Municipal More Dispensary, Malwan. He had also examined accused on 12/2/1991 on being referred to him by the police. He did not find any injury on the private part of the accused but he found the accused capable of ejaculating semen. Thus, the medical examination of Kamini shows that there was possibility of attempt having been made on her person to commit rape, but so far as the medical examination of accused is concerned there is no cogent evidence about he having attempted to rape. It is important to note that sperms were not found in the private part of the girl. The C.A. report in respect of the clothes of the accused and Kamini do not give any indication about attempt having been made to rape her.

8. That apart, the main question is about establishing identity of accused. As per the evidence of complainant, house of the accused was hardly 25 paces away from the house of the complainant and girl Kamini. Kamini was not knowing the accused and

therefore she had neither given the name of the accused nor pointed out the house where he was residing. The accused was identified in the presence of her parents on the following day when he was spotted on the road. In such case when the accused was stranger to the girl, T.I. parade ought to have been held to establish the identity of the accused, even before the witness identifies the accused in the court. Secondly, when the girl was about 9 years old and studying in 4th standard and was also going out for selling fruits, she was expected to know the accused by face who was staying hardly 25 paces away from her own house and also his residence. She neither gave his name nor gave his address. Therefore, the accused was as good as stranger to her. In those circumstances it was necessary to hold T.I. parade to establish the identity of the accused. From his medical examination and the examination of his clothes, there is no indication or evidence of his having made such attempt. Even the semen was not found on the clothes of the girl or on her person on the basis of which corroboration could have been sought to her evidence. The trial court has relied on certain judgments to point out that it was not safe to rely on the uncorroborated testimony of the child witness, especially when there was no identification

parade. The trial court has also observed that the sister of Kamini, Pusphalata who had accompanied her at the relevant time ought to have been examined. The trial court has also relied on the absence of injury on the person of the accused and no semen having been found on the muddemal clothes of the accused as well as of the girl.

9. In our view the reasons given by the trial court are not only not perverse but the view taken by the trial court is a possible view which cannot be substituted by appeal court in an appeal against the order of acquittal. The identity of the accused, who had allegedly attempted to commit rape on Kamini, has not been established by the prosecution beyond reasonable doubt. In our view the trial court has rightly given the benefit of doubt to the accused and we see no good reason to interfere and take exception to the view taken by the trial court. In the circumstances, we find no substance in the State appeal to warrant any interference in the order of acquittal passed by the trial court.

10. In the result, the order of acquittal recorded by the Additional Sessions Judge, Sawantwadi, Sindhudurg on 29/4/1992 in Sessions Case No.34 of 1991

is confirmed and the appeal is dismissed.

(S.S. Parkar, J.)

(S.R. Sathe,J.)